No. 92-911

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

ROBERTO RODRIGUEZ,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit erroneously construed the Sixth Amendment as permitting a waiver of the right to conflict-free counsel where the trial court, at the urging of both the prosecutor and defense counsel, obtained such waiver by utilizing a "hypothetical" conflict scenario which withheld from the defendant the true facts of the conflict.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERTO RODRIGUEZ,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-referenced case on April 10, 1992.

DECISION BELOW

The decision of the United States Court of Appeals for the Second Circuit, *United States v. Rodriguez*, ____ F.2d ____ (2d

Cir. 1992), is appended hereto as Appendix A. The sealed proceedings in the district court and letter to which those proceedings refer, have been appended hereto as Appendix B.[1]

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was entered on April 10, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

Petitioner entered into a cooperation agreement with the United States Attorney for the Southern District of New York and agreed to enter a guilty plea to the charge of conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848(a). He did so upon the advice of counsel, Frank Lopez,

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[1]In its opinion below, the Second Circuit indicated that the proceedings included in Appendix B, "remain under seal." *See* Appendix A, at p. 12a.

Esq. At the time counsel rendered this advice, his own wife was a cooperating witness with the very same prosecutorial office. Facing serious narcotics charges in the Northern District of California, counsel's wife, Lydia Lopez, agreed to cooperate with both that prosecutorial office and the U.S. Attorney for the Southern District of New York. In a letter submitted to the district court on the day petitioner's plea was scheduled to be entered, the prosecutor urged the court:

> "Because the fact of Mrs. Lopez' plea and her cooperation are under court-ordered seal, *the Government requests that the Court not inform Mr. Rodriguez of those facts.* Instead, the Government requests that the Court advise Mr. Rodriguez of the possibility -- open to any defendant -- that Mrs. Lopez might plead and cooperate with the authorities. The Court may wish to present Mr. Rodriguez with, a hypothetical 'worst-case scenario' and to ask him to assume that Mrs. Lopez is in fact cooperating with the Government."

(Appendix B, at p. 39a) (emphasis added). The prosecutor indicated further:

> "... Mr. Lopez concurs in the procedures suggested by the Government in this letter."

(Appendix B, at p. 36a).

Since the prosecutor and defense counsel had agreed to withhold the critical information, the district court acquiesced in their procedure. Petitioner appeared before the court a few hours later. He was represented by Mr. Lopez and, because petitioner spoke no English, the court had arranged for a Spanish interpreter. In keeping with the plan to deceive petitioner, Mr. Lopez indicated falsely:

> "Your Honor, may I just point out, we really don't know what Lydia Lopez' position is right now...."

(Appendix B, at p. 43a). The court then posed a series of rapid fire questions which petitioner perfunctorily answered "yes" or "no." Finally, the court asked the "hypothetical":

> "... so what I want you to do is to assume the worst possible situation, assume that Mrs. Lopez or the former Mrs. Lopez did cooperate or was cooperating with the government and was trying to get a lighter sentence, and assume that Mr. Lopez, your lawyer, wanted her to get as light a sentence as she could, and assume that he feared that if he represented you too vigorously, he might irritate the government and that in some way they would not give his former wife a lighter sentence or ask the court to give his former wife a lighter sentence because of how strong a defender he was in your case."

(Appendix B, p. 50a). Based on the "hypothetical" facts, petitioner agreed, through the interpreter, to waive his right to conflict-free counsel.

The Decision of the United States Court of Appeals

In its analysis of petitioner's waiver of his right to conflict-free counsel, the United States Court of Appeals for the Second Circuit stressed that the "worst possible scenario" of counsel's conflict had been explained to petitioner. The court's opinion did not, however, detail the specific circumstances of counsel's conflict or indicate that the true facts had been deliberately withheld from petitioner. The court concluded that petitioner's waiver was knowingly and voluntarily entered:

"In the present case, the district court substantially followed the prescribed procedures. It advised Rodriguez of the potential dangers arising from Lopez's conflict of interest; it clearly spelled out for Rodriguez the worst-case scenario of how the conflict could conceivably affect Lopez's representation of him; it repeatedly informed him that, if he wished he could be provided with separate counsel, either to replace Lopez, or simply to advise him on whether he should waive his right to conflict-free counsel. Though most of his responses were 'Yes' or 'No,' and though Rodriguez made his decision almost immediately after the court informed him of his options, the proceedings left no doubt that he understood that he could have independent counsel to advise him ('Yes, I could, yes.' Sealed Tr. 11-12), and that he did not wish to do so ('No, I don't want to consult about anything with any other attorney.' *Id.* at 12).

In light of all the circumstances, the district court did not err in finding that Rodriguez's decision to waive conflict-free counsel was knowing and intelligent."

Appendix A at p. 18a.

REASONS FOR GRANTING THE WRIT

POINT

THE DECISION OF THE UNITED STATES COURT OF APPEALS CONCERNING PETITIONER'S WAIVER OF CONFLICT-FREE COUNSEL PRESENTS AN IMPORTANT AND RECURRING ISSUE OF SIXTH AMENDMENT JURISPRUDENCE WHICH THIS COURT OUGHT TO REVIEW

This Court has previously recognized that the Sixth Amendment right to counsel encompasses a right to counsel unimpaired by conflicts of interest. *See Holloway v. Arkansas*, 435 U.S. 475, 481-482 (1978); *Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948); *Glasser v. United States*, 315 U.S. 60, 70 (1942). A criminal defendant may choose to waive the right to conflict-free counsel. *See Holloway v. Arkansas*, *supra*, at 483 n. 5; *Glasser v. United States*, *supra*, at 70. The trial court must, in that circumstance, assume the "serious and weighty responsibility" of determining that the defendant's waiver is knowingly and intelligently entered. *See Glasser v. United States*, *supra*, at 71; *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938); *see, also, Von Moltke v. Gillies*, *supra*, at 723. And, even where the trial court does so find, it nevertheless retains

> "... substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses."

Wheat v. United States, 486 U.S. 153, 163 (1988). Clearly, this Court has vested substantial discretion with the district

courts regarding waivers of the Sixth Amendment right to conflict-free counsel.

And yet, despite the critical role played by district courts in this area, this Court has never articulated criteria or procedures to guide these courts in exercising their considerable discretion. This void is particularly acute because unlike the ordinary circumstance in which counsel protect their clients' interests [*see Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981)], the conflict situation impairs counsel from doing so and places the responsibility solely on the trial courts. As Chief Justice Rehnquist recently observed:

> "... the willingness of an attorney to obtain such waivers from his clients may bear an inverse relationship to the care with which he conveys all the necessary information to them."

Wheat v. United States, 486 U.S. at 163; *see Hoffman v. Leeke*, 903 F.2d 280, 289 (4th Cir. 1990); *United States v. Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986); *United States v. Carrigan*, 543 F.2d 1053, 1058 (2d Cir. 1976). The instant case, in which defense counsel conspired with the prosecution to withhold crucial information from his client, proves this point only too well. In light of the compromising position of counsel in these conflict cases, and the heavy responsibility to be assumed by trial courts in protecting the rights of the accused, the Court's guidance is essential.

In the absence of a definitive pronouncement from the Court, the circuits have endeavored to fashion their own procedures governing waivers of conflict-free counsel.[2] Several circuits

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[2]Rule 44(c) of the Federal Rules of Criminal Procedure governs procedures regarding a single type of conflict of interest: joint representation. It does not include those situations, such as the one encountered herein, where the

(continued...)

have looked toward Rule 11 of the Federal Rules of Criminal Procedure, governing procedures for the entry of guilty pleas, as a paradigm. *See, e.g., United States v. Mers*, 701 F.2d 1321, 1325 (11th Cir. 1983), *cert. denied*, 464 U.S. 991 (1984); *United States v. Curcio*, 680 F.2d 881, 889 (2d Cir. 1982); *Gray v. Estelle*, 616 F.2d 801 (5th Cir. 1980); *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975). These circuits have, without requiring "any particular litany of questions" [*United States v. Jenkins*, 943 F.2d 167, 176 (2d Cir. 1991); *United States v. Elkins*, 774 F.2d 530, 541 (1st Cir. 1985)], prescribed specific guidelines and areas of inquiry for the trial courts to pursue. For example, the Fifth Circuit, in *United States v. Garcia*, *supra*, advised trial courts:

> "... to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections."

Id. at 278. Similar specific lines of inquiry have been adopted by the First, Second and Eleventh Circuits. *See United States*

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[2](...continued)
attorney's personal interests conflict with those of his or her client. *See, e.g., United States v. Tatum*, 943 F.2d 370, 376 (4th Cir. 1991); *Manhalt v. Reed*, 847 F.2d 576, 580 (9th Cir. 1988); *United States v. Ellison*, 798 F.2d 1102, 1106-1107 (7th Cir. 1986). Moreover, apart from requiring district courts, in the limited circumstances under which it applies, to "... personally advise each defendant of the right to the effective assistance of counsel, including separate counsel," the rule offers little in the way of substantive guidance. Indeed, its vague directive that district courts "... take such measures as may be appropriate to protect each defendant's right to counsel," is the most telling indication of its limitations in this regard.

v. Martorano, 610 F.2d 36, 40 (1st Cir. 1979); *United States v. Foster*, 469 F.2d 1, 5 (1st Cir. 1972); *Williams v. Meachum*, 948 F.2d 863, 866 (2d Cir. 1991); *United States v. Curcio*, *supra*; *Duncan v. Alabama*, 881 F.2d 1013, 1017 (11th Cir. 1989); *United States v. Mers*, *supra*. Other circuits, including the Sixth, Seventh, Eighth and Ninth, have been less specific, prescribing only a general framework in which defendants must be informed of the conflict and the risks posed thereby. *See United States v. Straughter*, 950 F.2d 1223 (6th Cir. 1991); *United States v. Ellison*, 798 F.2d 1102, 1108 (7th Cir. 1986); *United States v. Noble*, 754 F.2d 1324, 1333 (7th Cir. 1985); *United States v. Bradshaw*, 719 F.2d 907, 911 (7th Cir. 1983); *United States v. Lawriw*, 568 F.2d 98, 104-105 (8th Cir. 1977); *Manhalt v. Reed*, 847 F.2d 576, 580 (9th Cir. 1988); *United States v. Allen*, 831 F.2d 1487, 1500 (9th Cir. 1987).

A divergence of opinion can be also be found in the manner in which lower courts have treated the issue of independent counsel. Many lower courts require notification that independent counsel can be retained or appointed for the defendant whose attorney labors under a conflict. But, these courts differ in their view of the appellate significance of the failure to notify, the circumstances of the notification and whether the role of independent counsel is merely to render impartial advice to the defendant concerning the conflict, or actually to replace prior counsel and represent that defendant in the substantive matter under litigation. *See, e.g., United States v. Straughter*, 950 F.2d 1223 (waiver was valid where defendant was informed that separate counsel could be appointed for her); *United States v. Roth*, 860 F.2d 1382, 1389 (7th Cir. 1988), *cert. denied*, __ U.S. __, 109 S.Ct. 2099 (1989) (a trial court must ensure that the defendant understands "his entitlement to conflict-free counsel"); *United States v. Noble*, 754 F.2d at 1333-1334 (where the district court appointed the Administrator of the Federal Defender Program to explain the ramifications of the conflict to

defendant, his waiver was valid); *United States v. Mers*, 701 F.2d at 1325 (the failure to notify defendant of his right to separate counsel was harmless error); *United States v. Curcio*, 680 F.2d at 889 (defendant must not only be notified of his right to separate counsel, but must be granted "a reasonable time to digest and contemplate" this advice); *United States v. Alvarez*, 580 F.2d 1251, 1259-1260 (5th Cir. 1978) (reversing conviction where defendant was not advised of his right to separate counsel); *United States v. Lawriw*, 568 F.2d at 105 (that the trial court's inquiry included the right to separate, independent counsel was an important factor in finding waiver); *United States v. Donohue*, 560 F.2d 1039 (1st Cir. 1977) (reversing conviction where the defendant was never informed of his right to separate counsel); *United States v. Bailin*, 731 F. Supp. 865, 871-872 (N.D. Ill. 1990) ("... before fully accepting the defendants' waivers, the court will take the step of assuring that each defendant understands his rights by appointing special counsel to explain these rights...."); *People v. Easley*, 46 Cal.3d 712, 759 P.2d 490, 501 (Cal. 1988) (en banc) (reversing capital conviction where the defendant was never offered an opportunity to discuss the conflict with independent counsel); *People v. Caban*, 70 N.Y.2d 695, 512 N.E.2d 536 (N.Y. 1987) ("... there is no per se rule requiring consultation with independent counsel).

The lower courts have had ample opportunity to reach consensus on their approach to these issues surrounding waiver of conflict-free counsel but have, thus far, proved incapable of doing so. The confusion stemming from the lack of consensus in the circuits, when coupled with the absence of clear guidelines from this Court, may explain, at least partially, the district court's ill-advised decision to utilize "hypothetical," as opposed to actual facts, to procure petitioner's supposedly "knowing" waiver of his right to conflict-free counsel. Although defense counsel's wife had already agreed to cooperate with the very same prosecutorial office with which defense counsel urged petitioner's cooperation, defense counsel agreed with the

prosecutor to withhold this fact from petitioner. *See* Appendix B, at pp. 36a, 39a. They devised a plan to convince petitioner that defense counsel's wife was *not* a cooperating witness, but merely that she could, "hypothetically," become one in the future. Defense counsel, displaying the depths to which he was compromised by the situation, stated in court:

> "Your Honor, may I just point out, we really don't know what Lydia Lopez' position is right now..."

(Appendix B, at p. 43a), even though the statement was demonstrably false. The district court, no doubt impressed by the unanimity of prosecutor and defense counsel with regard to the unprecedented "hypothetical" procedure, and aware of its virtually unlimited discretion in the area of waivers of conflict-free counsel, agreed to utilize the procedure. This was error.

The use of hypothetical facts which disguise or alter the true facts, as here, should be unacceptable. First, the waiver of a fundamental constitutional right must be knowing and intelligent, which clearly requires knowledge of all relevant facts. *See Von Moltke v. Gillies*, 332 U.S. at 723; *United States ex rel. Duncan v. O'Leary*, 806 F.2d 1307 (7th cir. 1986). As previously stated, the relevant fact of defense counsel's wife's cooperation was withheld from petitioner. Instead, petitioner, who did not understand English, was informed through a court interpreter of the mere "hypothetical" possibility that this would occur. Though petitioner appeared willing to accept this somewhat remote "possibility," the true facts may have left him far less amenable to working with conflicted counsel. It is one thing to be told that something *may* occur, but it is entirely another matter to be informed that it already *has* occurred. Petitioner may have chosen to take the risk that defense counsel's wife would not cooperate and, on that basis, decided to continue with defense counsel. The fact that what he had decided to risk had already become a reality, could have changed his decision as to how he wished to proceed. He

should have been provided with the facts upon which to render an informed decision.

In addition to the use of the "hypothetical," petitioner's waiver was defective in another critical respect. Several circuits, including the Second Circuit, prescribe as minimal procedural requirements that defendants offer narrative responses and have adequate time in which to consider their waiver decisions. *See United States v. Curcio*, 680 F.2d at 885. These important procedures went unfulfilled in the district court. Petitioner, speaking through an interpreter, perfunctorily responded "yes" or "no" to the court's inquiry and was compelled to render a decision on whether to waive his right to conflict-free counsel immediately upon receipt of information concerning the "hypothetical" possibility of defense counsel's conflict. Accordingly, even without the use of the "hypothetical," petitioner's waiver was defective.

Under all of these circumstances, and particularly in light of the use of "hypothetical" possibilities instead of actual facts, the district court erred in finding that petitioner knowingly and intelligently waived his right to conflict-free counsel. We urge this Court to grant a writ of certiorari, not only to correct the erroneous holdings below, but to provide critically needed guidance to the district courts which must routinely confront conflict situations of this type.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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June, 1992

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 28, 527, 528, 529, 530, 531, 532, 533, 703—
August Term, 1991

(Argued: November 18, 1991
Final Briefs Submitted
November 22, 1991 Decided: April 9, 1992)

Docket Nos. 91-1152, -1160, -1167, -1169,
-1170, -1228, -1286, -1287, -1379

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERTO RODRIGUEZ, LUIS ROSADO, also known as Manuel Carillo, NELSON NOA, RAFAEL FLORES, RONNIE L'RUE, MIRELLA PACHECO, JOSE COTS, NELSON GARCIA, also known as Nelson Cabilla, NOEL AGUERO,

Defendants-Appellants.

Before:

FEINBERG, MESKILL, and KEARSE,
Circuit Judges.

Appeals from judgments of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, convicting defendants of various narcotics offenses. *See* 734 F. Supp. 116 (1990).

Affirmed.

Judge Meskill filed a separate concurring opinion.

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DAVID COOPER, New York, New York, *for Defendant-Appellant Rafael Flores.*

GERALD J. MCMAHON, New York, New York, *for Defendant-Appellant Ronnie L'Rue, joined the brief submitted for Defendant-Appellant Flores.*

VINCENT L. VERDIRAMO, Jersey City, New Jersey (Verdiramo & Verdiramo, Jersey City, New Jersey, on the brief), *for Defendant-Appellant Mirella Pacheco.*

DANIEL MEYERS, New York, New York, *for Defendant-Appellant Jose Cots.*

MARTIN J. SEIGEL, New York, New York, *for Defendant-Appellant Nelson Garcia.*

JOYCE LONDON, New York, New York (Susan G. Kellman, New York, New York, on the brief), *for Defendant-Appellant Noel Aguero.*

KEARSE, *Circuit Judge*:

Defendant Roberto Rodriguez ("Rodriguez") appeals from a judgment of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, convicting him, following his plea of guilty, on one count of conducting a continuing criminal enterprise, in violation of 21 U.S.C. §§ 848(a), 853(a)(1), 853(a)(2), and 853(a)(3) (1988). Defendants Luis Rosado, Nelson Noa, Rafael Flores, Ronnie L'Rue, Mirella Pacheco, Jose Cots, Nelson Garcia, and Noel Aguero appeal from judgments entered in the same court following a jury trial before Judge Stanton, convicting all of them except Noa on one count of conspiracy to possess with intent to distribute more than 50 grams of crack cocaine, in violation of 21 U.S.C. § 846 (1988). Noa was convicted of possession of approximately 18 grams of crack, in violation of 21 U.S.C. § 844(a) (1988). Rodriguez was sentenced principally to 360 months' imprisonment and ordered to

forfeit assets in the amount of $550,000. Garcia, having two prior narcotics felony convictions, was sentenced to life imprisonment. The remaining appellants were sentenced principally to the following prison terms: Rosado, 192 months; Noa, 60 months; Flores, 222 months; L'Rue, 240 months; Pacheco, 151 months; Cots, 204 months; and Aguero, 300 months.

On appeal, appellants make numerous arguments, including principally (1) their contention that the district court erred in refusing to suppress evidence obtained through court-authorized wiretaps, (2) Rodriguez's contentions that he should be allowed to withdraw his plea of guilty, and (3) Rodriguez's challenges to his sentence. For the reasons below, we reject all of appellants' contentions and affirm the judgments of conviction.

I. BACKGROUND

The present prosecution arises out of the investigation of a crack organization in the Bronx, New York, headed by Rodriguez (the "Rodriguez Organization" or "Organization"). The government's proof at trial included (1) the testimony of coconspirator Evaristo Valentin, who had been Rodriguez's right-hand man overseeing the operation of the Organization, and of Aurea Rodriguez (not related to Roberto Rodriguez), another former member of the Organization; (2) excerpts of telephone conversations recorded by means of court-authorized wiretaps; (3) surveillance videotapes; (4) unpackaged crack and cocaine, packaging materials, and more than 3,000 vials filled with crack, seized from more than 20 locations; and (5) other physical evidence including detailed drug records. The evidence, taken in the light most favorable to the government, painted the following overall picture.

From prior to 1988 until July 1989, Rodriguez presided over a large-scale narcotics operation in the Hunts Point section of the Bronx. The Organization operated a retail crack outlet that was open for business 24 hours a day, seven days a week. From this outlet an average of 1,200 to 2,600 vials of crack, at $5 per vial, were sold every day. The Organization also maintained many apartments in Hunts Point and elsewhere in the Bronx for processing, packaging, and storing the crack, or for storing drug records and profits.

Proceeds from the crack sales, often stored temporarily in an apartment occupied by Aurea Rodriguez, were eventually taken to the Imperio Cafe, a restaurant owned by Roberto Rodriguez in New Jersey. L'Rue, the cafe's cook and manager, received and counted the money and ultimately delivered it to Rodriguez. The other appellants played various other roles in the Organization. Garcia was one of Rodriguez's main suppliers of cocaine; Flores was a courier who sometimes cooked cocaine into crack; Rosado and Cots served as, *inter alia*, packagers; and Aguero was the boss of one of the two daily shifts at the retail outlet, ensuring that there was sufficient packaged crack available for sale. Pacheco was Rodriguez's wife or girlfriend and served as his general assistant, at various times packaging and transporting crack, or counting and transporting the proceeds from the sales.

The investigation of the Rodriguez Organization's operations included raids in 1988 pursuant to search warrants, physical surveillance and videotaping, court-authorized pen registers, and court-authorized wiretaps in 1989 on four telephones at the Imperio Cafe and on the Bronx telephone of Aurea Rodriguez. Appellants and other members of the Organization were arrested in July 1989 as part of a coordinated series of raids.

The initial indictment charged 22 persons, including appellants, with participating in a large-scale narcotics conspiracy, in violation of 21 U.S.C. § 846, and charged Roberto Rodriguez as well with, *inter alia*, conducting a continuing criminal enterprise, in violation of 21 U.S.C. § 848(a). Rodriguez entered into a written cooperation agreement with the government, in which he agreed to plead guilty to the continuing criminal enterprise count and agreed to forfeit assets. The government agreed to withdraw the other counts against him and to recommend a downward departure in sentencing if he gave the government substantial assistance in the investigation or prosecution of other persons. As discussed in greater detail in Part II.B. below, after a hearing that included inquiry into a potential conflict of interest on the part of the attorney then representing Rodriguez, the district court accepted the plea.

Following the guilty pleas of Rodriguez and others, a superseding indictment was filed against the remaining defendants. To the extent pertinent here, count 1 of the superseding indictment charged appellants other than Rodriguez with conspiracy; count 2 charged Noa with possession of 18.2 grams of crack with intent to distribute, in violation of 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A) (1988). As discussed in greater detail in Part II.A. below, prior to trial defendants moved to suppress information obtained through the wiretaps on the Imperio Cafe telephones, contending that the orders purporting to authorize the pen registers and wiretaps were jurisdictionally defective because they were issued by a federal court in New York, rather than a court in New Jersey, the jurisdiction in which the telephones were located. In an opinion reported at 734 F. Supp. 116 (1990), the district court concluded that the orders complied with the perti-

nent statutory requirements. It ruled that since the telephone communications were actually heard and recorded at United States Drug Enforcement Administration ("DEA") headquarters in Manhattan, which is within the Southern District of New York, and the pen register information was received there as well, the use of the pen registers and the interceptions of the conversations occurred in the Southern District of New York and thus within the territorial jurisdiction of the issuing authorities. *Id.* at 120-21, 123. Accordingly, it denied the motions to suppress.

After a 13-week trial at which, *inter alia*, Valentin described in detail the Rodriguez Organization's operations and the government introduced some 90 conversations intercepted by means of the wiretaps, the jury found all of the appellants who were tried, except Noa, guilty of conspiracy to possess with intent to distribute more than 50 grams of crack. Noa was acquitted of conspiracy; he was also acquitted of possession of crack with intent to distribute but was found guilty of the lesser included offense of simple possession of crack, in violation of 21 U.S.C. § 844(a). Appellants were sentenced as indicated above. The 360-month sentence on Rodriguez, imposed after the trial of his codefendants, represented a substantial upward departure from the range of imprisonment established by the applicable version of the federal Sentencing Guidelines ("Guidelines").

These appeals followed.

II. DISCUSSION

On appeal, appellants other than Rodriguez contend principally that they are entitled to a new trial on the

ground that the court orders authorizing the wiretaps and pen registers on the New Jersey telephones were jurisdictionally defective and that the information obtained from the wiretaps should therefore have been suppressed. Rodriguez contends principally (a) that his case should be remanded to permit the district court to determine whether he may withdraw his plea because of his first attorney's conflict of interest, or alternatively (b) that his sentence should be vacated because the district court failed to follow proper sentencing procedures. Appellants also make a variety of additional arguments that we conclude are without merit and warrant little or no discussion.

A. *The Pen Register and Wiretap Authorizations*

In April and May of 1989, in connection with its investigation of the Rodriguez Organization, the DEA obtained authorizations from magistrate judges in the Southern District of New York to install and use pen registers on four telephones at the Imperio Cafe ("Cafe phones"). In June 1989, relying in part on information obtained through the pen registers, the DEA obtained from District Judge Peter K. Leisure, of the same court, authorization for electronic interception of telephone calls to or from the four Cafe phones, and to or from Aurea Rodriguez's telephone in the Bronx. The order was entered on the government's representation, *inter alia*, that all of the interception equipment for these five telephones would be installed and used at DEA headquarters in the Southern District of New York. Appellants contend that the orders entered in the Southern District of New York for pen registers and wiretaps on the Cafe phones were not authorized by the federal statutes governing such matters, arguing that since the Cafe is located in New Jersey, law-

ful orders could only be obtained from a court in the District of New Jersey. For the reasons below, we disagree.

1. *The Pen Registers*

A pen register is a mechanical device that simply records the telephone numbers dialed on a given telephone. It does not indicate whether the calls dialed were completed, and it does not capture the contents of the communications. *See generally United States v. New York Telephone Co.*, 434 U.S. 159, 161 n.1 (1977). Such devices are governed by 18 U.S.C. §§ 3121-3127 (1988), which allows a district court to authorize "the installation and use of a pen register . . . within the jurisdiction of the court," *id.* § 3123.

In the present matter, after receiving authorization for the use of pen registers, the DEA arranged with New Jersey Bell Telephone Company to lease a telephone line running from near the Imperio Cafe to the DEA's Manhattan headquarters. The pen registers were installed, monitored, and used at DEA headquarters. Thus, though the telephones whose dialings were being registered were located in New Jersey, the pen registers themselves were located in the Southern District of New York. We conclude that the registers were installed and used within the jurisdiction of the court that issued the authorizations.

2. *The Wiretaps*

The installation and use of wiretaps are governed by the Omnibus Crime Control and Safe Streets Act ("Title III"), 18 U.S.C. §§ 2510-2521 (1988). The section on which appellants focus provides that a "judge may enter an ex parte order . . . authorizing or approving interception of wire, oral, or electronic communications within the ter-

II.

ritorial jurisdiction of the court in which the judge is sitting." 18 U.S.C. § 2518(3). The term "intercept[ion]" is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." *Id.* § 2510(4).

The statute does not specify precisely where an interception is deemed to occur. It seems clear that when the contents of a wire communication are captured or redirected in any way, an interception occurs at that time. Such an interception plainly occurs at or near the situs of the telephone itself, for the contents of the conversation, whether bilateral as is usually the case, or multilateral as is the case with a conference call, are transmitted in one additional direction. Redirection presupposes interception. Accordingly, a federal court sitting in the jurisdiction in which the to-be-tapped telephone is located would have the authority, under § 2518(3), to authorize a wiretap.

Nonetheless, since the definition of interception includes the "aural" acquisition of the contents of the communication, the interception must also be considered to occur at the place where the redirected contents are first heard. *See Webster's New International Dictionary*, at 182 (2d ed. unabridged 1957) (defining "aural" as "of or pertaining to the ear or the sense of hearing"). Indeed, prior to 1986, Title III's definition of interception focused on "aural acquisition[s]" alone. The phrase "or other" was inserted into the present definition as part of a modernization of Title III to ensure privacy protection for new forms of communication such as electronic pagers, electronic mail, and computer-to-computer communications. *See generally* S. Rep. No. 99-541, 99th Cong., 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News ("USCCAN") 3555, 3555-57, 3562-65, 3567; *see also*

United States v. Hux, 940 F.2d 314, 316 (8th Cir. 1991). The amendment thus expanded a definition that previously had "only applie[d] where the contents of a communication c[ould] be overheard and understood by the human ear." USCCAN at 3556. Though it is plain that Congress intended to expand the scope of Title III to extend its protections to modern forms of communication, there is no indication in the legislative history that it intended to extinguish the principle that the place where the contents of a wire communication are first to be heard and understood by human ears, other than those of the parties to the conversation, is the situs of an interception within the meaning of § 2510(4).

Further, where the authorities seek to tap telephones in more than one jurisdiction and to monitor them in a single jurisdiction, there are sound policy reasons for permitting a court in the jurisdiction where all of the captured conversations are to be heard to grant the authorization. One of the key goals of Title III is the protection of individual privacy interests from abuse by law enforcement authorities. *See generally*, S. Rep. No. 1097, 90th Cong. 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2185; *United States v. Giordano*, 416 U.S. 505, 514-23 (1974). For example, Title III requires that a wiretap authorization not allow the period of interception to be "longer than is necessary to achieve the objective of the authorization." 18 U.S.C. § 2518(5). If all of the authorizations are sought from the same court, there is a better chance that unnecessary or unnecessarily long interceptions will be avoided. We doubt that Congress intended to eliminate this possibility.

In sum, the language of § 2510(4), the legislative history of that section, and the policy considerations of Title III all persuade us that for purposes of § 2518(3)'s juris-

dictional requirement, a communication is intercepted not only where the tapped telephone is located, but also where the contents of the redirected communication are first to be heard. Appellants' motion to suppress the evidence obtained through the wiretaps was properly denied.

B. *Rodriguez's Challenges to His Plea and Sentence*

Rodriguez's principal contentions on this appeal are (1) that he is entitled to a remand to permit him to move to withdraw his plea because of the possible conflict of interest on the part of his prior counsel; and (2) that the court failed to follow the sentencing procedures required by *United States v. Kim*, 896 F.2d 678, 687 (2d Cir. 1990). We are unpersuaded.

1. *The Possible Conflict of Counsel*

The background of Rodriguez's arguments with regard to his plea of guilty is as follows. Prior to the hearing with respect to the plea, the government alerted the district court to circumstances giving rise to what it termed a "hypothetical" conflict of interest on the part of Rodriguez's then-attorney, Frank Lopez. While stating that it believed the circumstances did not give rise to an actual conflict, and that Lopez had reported that he had advised Rodriguez of the circumstances, the government asked the court to conduct a *Curcio* inquiry, *see United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), to ascertain whether Lopez had made appropriate disclosures and to ensure protection of Rodriguez's Sixth Amendment right to counsel.

At the first part of the hearing, in proceedings that were placed under seal and, except to the extent revealed here, remain under seal, Lopez described the details of his cir-

cumstances to the court. He stated that he had disclosed the pertinent details to Rodriguez, and he stated that Rodriguez was prepared to respond to questions from the court. Later, Lopez also stated that he had never discussed with the Assistant United States Attorney or anyone else any impact that his representation of Rodriguez might have on the other circumstances described to the court.

The court asked Rodriguez whether he understood Lopez's initial statement, and Rodriguez said he did. The court itself then described the circumstances to Rodriguez, who intermittently responded that he understood. The court described for Rodriguez what it termed the "worst possible" scenario and the consequent risk that Lopez could have a conflict of interest vis-à-vis Rodriguez. Rodriguez stated that he understood, that he had no questions, and that he did not want to consult another attorney. The court's questioning ended as follows:

> THE COURT: Now, if you have any reluctance of any sort or you'd prefer to take some time to think this over or you'd like to talk to another lawyer about it out of Mr. Lopez' hearing and get another opinion or, as I say, if you're the least bit reluctant to proceed with Mr. Lopez, just say so and I'll give you the opportunity to think it over, to discuss it with any other lawyer that we could provide, to change counsel, whatever you wish in this connection. Would you like to do any of those things?
>
> THE DEFENDANT: No.
>
> THE COURT: Now, you understand that you could have separate counsel representing you?
>
> THE DEFENDANT: That I could have?

THE COURT: Separate counsel, somebody else than Mr. Lopez.

THE DEFENDANT: No.

THE COURT: Do you understand you could have that?

THE DEFENDANT: Yes, I could, yes.

THE COURT: But you don't wish that. Is that what you're saying?

THE DEFENDANT: No.

THE COURT: You don't wish it?

THE DEFENDANT: No, I don't.

THE COURT: Do you wish to consult with any other counsel about this?

THE DEFENDANT: No, I don't want to consult about anything with any other attorney.

(First Plea Hearing Transcript dated February 27, 1990 ("Sealed Tr."), 11-12.) The court found that Rodriguez was

> competent and understands the colloquy which we have had about [the possible conflict], that he appreciates the risk that Mr. Lopez' predicament might in some way temper or weaken Mr. Lopez' representation of Mr. Rodriguez, and that with that understanding in mind, he chooses not to consult with any other lawyer or to take time to think the situation over further or to avail himself of the offer of separate counsel, but willingly and voluntarily desires to proceed with the plea.

(*Id.* at 13.) Ordering that so much of the transcript as pertained to the conflict question be sealed, the court stated that copies would be available to the government and Lopez without the need for a motion but would be available to others only upon application to the court.

After conducting further proceedings in open court with respect to Rodriguez's plea of guilty to the continuing criminal enterprise count, the court accepted the plea.

Several months after pleading guilty, Rodriguez obtained new counsel, Roger Stavis, and, as discussed in Part II.B.3. below, moved to withdraw his plea on the ground that he had entered that plea in the belief that the government would release Pacheco, his common-law wife, from the prosecution. In connection with that motion, Stavis sought access to the sealed portion of the plea hearing transcript. The court denied the request, stating that the subject matter was entirely collateral to the motion at hand. It reiterated that view when Stavis renewed his request at sentencing.

In his initial briefing of the present appeal, Rodriguez argued that his new attorney should have been given access to the sealed portion of the transcript and that the matter should be remanded to permit counsel, once access was given, to move to withdraw the guilty plea on the ground of his former attorney's conflict of interest. We agreed with Rodriguez that his new attorney should have been given access to the sealed transcript. Even if the matters there discussed had no relevance to the specific question that was raised in the motion to withdraw the plea, access should have been given to enable new counsel to determine whether the prior proceedings revealed any other ground for withdrawal of the plea, such as the adequacy of the allocution or the Sixth Amendment

inquiry. In any event, new counsel should have been given access in order to enable him to determine whether the plea proceedings provided any grounds for appeal. Accordingly, at oral argument, we directed that the sealed portion of the transcript be made available to Rodriguez's counsel. We permitted both sides to submit supplemental letter briefs on the issue of whether, in light of the contents of the sealed transcript, a remand is necessary.

In his letter brief, Rodriguez contends that the sealed transcript reveals the existence of a serious conflict of interest on the part of Lopez. He argues that at this juncture the record is inadequate to permit this Court to decide the conflict-of-interest issue, and that a remand is necessary to develop a factual record. In light of the prevailing legal principles, we are unpersuaded.

The Sixth Amendment of course guarantees the defendant in a criminal trial the right to the effective assistance of counsel at all stages of the criminal prosecution, including the entry of a plea of guilty. *See, e.g., Hill v. Lockhart*, 474 U.S. 52, 57 (1985). In a few cases we have found the circumstances to constitute a *per se* violation of the right to counsel. *See, e.g., United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984) (defendant's attorney assumed, *arguendo*, to be guilty of criminal conduct related to that of which the defendant was accused); *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983) (defendant's attorney had never been licensed to practice law). The circumstances involving Lopez were not of these kinds but rather involved a possible conflict of interest not arising out of his own conduct.

A defendant's Sixth Amendment right to effective assistance of counsel includes the right to be represented, if he so chooses, by an attorney who has no conflict of

interest. *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Williams v. Meachum*, 948 F.2d 863, 866 (2d Cir. 1991); *United States v. Curcio*, 680 F.2d at 885. Nonetheless, a defendant may "choose to give up this right to an 'attorney of undivided loyalty in order to retain the attorney of his choice,' another right guaranteed by the Sixth Amendment." *Williams v. Meachum*, 948 F.2d at 866 (quoting *United States v. Curcio*, 680 F.2d at 885). In *United States v. Curcio*, 680 F.2d 881, we established procedures to be followed in situations in which a defendant states that he desires to waive his right to representation by an attorney who has no potential conflict of interest. We stated that the trial court should (1) advise the defendant of his right to conflict-free representation, (2) instruct the defendant as to the dangers arising from the particular conflict, (3) permit the defendant to confer with his chosen counsel, (4) encourage the defendant to seek advice from independent counsel, (5) allow a reasonable time for the defendant to make his decision, and (6) determine, preferably by means of questions that are likely to be answered in narrative form, whether the defendant understands the risks and freely chooses to run them. *Id.* at 888-890. The ultimate goal of these procedures is to permit the court to determine whether the defendant's waiver of his right to conflict-free counsel is knowing and intelligent. *Id.* at 888. Thus, "[i]n reviewing a defendant's waiver, . . . we are ultimately concerned less with the exact words used by the trial judge than with whether the facts and circumstances of the case indicate that the defendant fully appreciated his situation and made a properly informed decision." *Williams v. Meachum*, 948 F.2d at 867; *see United States v. Jenkins*, 943 F.2d 167, 176 (2d Cir.), *cert. denied*, 112 S.Ct. 659 (1991). Further, though it would seem preferable for the defendant to take time to ponder

his options or to consult with independent counsel, a prompt response does not invalidate his waiver if "there is no sign that the defendant lack[s] full comprehension of what he [is] doing." *Williams v. Meachum*, 948 F.2d at 867.

In the present case, the district court substantially followed the prescribed procedures. It advised Rodriguez of the potential dangers arising from Lopez's conflict of interest; it clearly spelled out for Rodriguez the worst-case scenario of how the conflict could conceivably affect Lopez's representation of him; it repeatedly informed him that, if he wished, he could be provided with separate counsel, either to replace Lopez, or simply to advise him on whether he should waive his right to conflict-free counsel. Though most of his responses were "Yes" or "No," and though Rodriguez made his decision almost immediately after the court informed him of his options, the proceedings left no doubt that he understood that he could have independent counsel to advise him ("Yes, I could, yes." Sealed Tr. 11-12), and that he did not wish to do so ("No, I don't want to consult about anything with any other attorney." *Id.* at 12).

In light of all the circumstances, the district court did not err in finding that Rodriguez's decision to waive conflict-free counsel was knowing and intelligent. Our review of the sealed transcript persuades us that no remand is warranted.

2. *The Extent of the Upward Departure in Sentencing*

In sentencing Rodriguez to a 360-month term of imprisonment, the court departed upward by six levels from the offense level prescribed by the applicable version of the Guidelines. Rodriguez contends that the sentence should

be vacated and the matter remanded for resentencing because the district court failed to consider explicitly, and state its reasons for rejecting, each interim level in accordance with *United States v. Kim*, 896 F.2d 678. We disagree.

In *United States v. Kim*, we stated that when the sentencing court is considering an upward departure under Chapter 5, Part K, of the Guidelines,

> the judge should consider the next higher [offense] levels in sequence to determine if they adequately reflect the seriousness of the defendant's conduct. Doing so will afford the judge an opportunity to compare the defendant's conduct, with its aggravating circumstances, to the type of conduct for which the Commission has prescribed more severe punishment.

United States v. Kim, 896 F.2d at 685. *See also United States v. Pergola*, 930 F.2d 216, 220 (2d Cir. 1991) ("the sentencing court should make clear on the record that it has considered lesser departures than the one eventually arrived at"); *United States v. Coe*, 891 F.2d 405, 412-13 (2d Cir. 1989) (explanation required with respect to Guidelines Ch. 4, Part A increase in criminal history category). *Kim* and its progeny were not, however, intended to be a straightjacket; the objective is to have the "judge . . . compare the defendant's conduct, with its aggravating circumstances, to the type of conduct for which the Commission has prescribed more severe punishment." *United States v. Kim*, 896 F.2d at 685. The fundamental premise is that when conduct not taken into account by the Guidelines provisions applicable to the defendant provides the basis for an upward departure, the court should not arrive at a sentence that exceeds the penalty that would have been imposed had the defendant been sen-

tenced under other Guidelines provisions that do take the same or similar conduct into account. This goal is accomplished when the court looks to analogous Guidelines provisions to determine the extent of the departure. Thus, "the point of *Kim* is to use . . . the sentencing table as useful guidance in determining the extent of a departure, not to precipitate a time-consuming analysis of every possible calculation of arguably relevant circumstances." *United States v. Baez*, 944 F.2d 88, 89 (2d Cir. 1991). The sentencing here met that objective.

Rodriguez's continuing criminal enterprise offense, as charged in the indictment, was committed from 1988 to July 1989. Though Rodriguez was not sentenced until March 1991, the district court properly concluded that the November 1, 1987 version of the Guidelines ("1987 Guidelines"), *i.e.*, the version in effect at the time the offense was committed, applied. In the 1987 Guidelines, § 2D1.5 established a flat offense level of 36 for a defendant convicted of heading a continuing criminal enterprise, regardless of the size of the organization or the quantity of narcotics sold. The commentary to that section provided, however, that if "the quantity of drugs substantially exceeds that required for level 36 in the drug quantity table, or if the number of persons managed by the defendant is extremely large," an upward departure might be warranted. Guidelines § 2D1.5 Application Note 2. In contemplating the sentence to be imposed on Rodriguez, the district court noted that a level of 36 corresponded to the sale of only a half-kilogram of crack, and that "[t]he offense in this case involved over 100 times that." (Sentencing Transcript dated March 7, 1991 ("Sent. Tr."), 25-26). The court concluded that that offense level was inadequate to reflect the nature of Rodriguez's crime and that it was "clear that the circumstances therefore war-

rant[ed] an upward departure as contemplated by" the commentary to § 2D1.5. (Sent. Tr. 26.)

By the time Rodriguez was sentenced in March 1991, the Guidelines had been amended. In the November 1, 1989 version, § 2D1.1, the drug quantity table, set an offense level of 42 for quantities of crack in excess of 15 kilograms. The court chose to look to this then-current version as "[t]he best guide for the degree of departure." (Sent. Tr. 26.) Given Rodriguez's criminal history category, a 42 offense level yielded a sentencing range of 360 months to life imprisonment.

We conclude that the district court appropriately compared Rodriguez's conduct "to the type of conduct for which the Commission has prescribed more severe punishment," *United States v. Kim*, 896 F.2d at 685, by seeking guidance from the new drug quantity table provided by the Commission. A mechanical level-by-level review of the extent of the upward departure was unnecessary.

3. *Rodriguez's Other Arguments*

Rodriguez also contends (a) that he should have been allowed to withdraw his plea of guilty because it was entered in the erroneous belief that the government would dismiss the indictment against Pacheco, and (b) that the court erred in accepting his plea of guilty without forewarning him that it intended to depart upward from the Guidelines range of imprisonment. Neither argument has merit.

A defendant has no absolute right to withdraw his plea of guilty. *United States v. Burnett*, 671 F.2d 709, 712 (2d Cir. 1982); *United States v. Giuliano*, 348 F.2d 217, 221 (2d Cir.), *cert. denied*, 382 U.S. 946 (1965). He bears the burden of persuading the trial court that valid grounds for

withdrawal exist, and the district court's decision to deny a motion to withdraw a guilty plea will be reversed only if its factual findings are clearly erroneous, *see United States v. Marquez*, 909 F.2d 738, 740 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991), or the denial is an abuse of discretion, *see United States v. Figueroa*, 757 F.2d 466, 475-76 (2d Cir.), *cert. denied*, 474 U.S. 840 (1985).

In his plea allocution, Rodriguez gave no indication that he was pleading guilty in order to secure favorable treatment for Pacheco. Rather, he stated that he "want[ed] to plead guilty to get this over with." (Second (Unsealed) Plea Hearing Transcript dated February 27, 1990, at 9). In response to questioning by the court, he stated that he had read and understood the terms of the written plea bargain agreement. He was asked whether anyone had made any other promises to him in connection with sentencing, and he answered in the negative. Remarking on that colloquy and noting that Rodriguez did not, in connection with his motion to withdraw his plea, claim his innocence of the charge to which he had pleaded guilty, the court denied the motion to withdraw the plea. The court's findings were not clearly erroneous and we see no abuse of discretion in its denial of the motion.

Rodriguez's lack-of-notice argument has no greater merit. Fed. R. Crim. P. 11 required the court to advise Rodriguez of the maximum sentence he faced and to advise him generally about the Guidelines. *See, e.g., United States v. Perdomo*, 927 F.2d 111, 116 (2d Cir. 1991); *United States v. Fernandez*, 877 F.2d 1138, 1142-44 (2d Cir. 1989). In addition, we have held that before departing upward from the Guidelines sentencing range, the court must give the defendant notice and an opportunity to contest the intended departure. *United States v.*

Colon, 905 F.2d 580, 584 (2d Cir. 1990); *United States v. Palta*, 880 F.2d 636, 640 (2d Cir. 1989).

The district court met these obligations. At the plea hearing, it informed Rodriguez of the minimum and maximum sentences provided in the statute. After advising Rodriguez that the imprisonment range recommended by the Guidelines was unclear, the court informed him that even after that range is determined, the court has the authority in some circumstances to impose a sentence that is more severe; and it informed him that if a more severe sentence than he expected were imposed, he would still be bound by his plea. Rodriguez responded that he understood. Subsequently, one month prior to sentencing, the court advised both sides in writing that it was considering whether an upward departure, in light of the vast quantity of cocaine sold, might be appropriate. No more was required.

C. *Other Arguments*

The other appellants make a variety of additional arguments, challenging, *inter alia*, the lawfulness of a search and seizure, a number of the trial court's evidentiary rulings, certain parts of the government's summation, and various aspects of sentencing. We have considered all of the arguments and have found them to be without merit. Only the following warrant discussion.

1. *The Summation Speculation as to the Role of Garcia*

The indictment alleged that Garcia was a supplier of cocaine to the Organization; the government's opening statement reiterated that theory. One of the intercepted conversations introduced at trial, however, reflected a

delivery by Garcia to Rodriguez of a substantial sum of money. In summation, the Assistant United States Attorney ("AUSA") speculated that Garcia might also on occasion have been a purchaser of narcotics from Rodriguez. Garcia contends that he was denied a fair trial by this statement because it changed the government's theory of his role in the conspiracy and permitted the jury to find him guilty of conduct with which he was not charged. We are unpersuaded.

Improper remarks during summation "must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error." *United States v. Young*, 470 U.S. 1, 11 (1985); *see United States v. Nersesian*, 824 F.2d 1294, 1327 (2d Cir.), *cert. denied*, 484 U.S. 958 (1987). "Whether a prosecutor's improper statement during summation results in a denial of due process depends upon whether the improper statement causes substantial prejudice to the defendant." *Id.* It is a "rare case" in which improper comments in a prosecutor's summation are so prejudicial that a new trial is required. *Floyd v. Meachum*, 907 F.2d 347, 348 (2d Cir. 1990).

In the present case, the trial court properly labeled the AUSA's characterization of Garcia as a buyer as speculation. The court directed the jury to disregard it, reminded the jury that there was no charge in the indictment as to any sales by Rodriguez to Garcia, and instructed the jury to focus on the evidence that was relevant to the charges that were made in the indictment. There was substantial evidence to support the conviction of Garcia for his role in the conspiracy as alleged in the indictment, and any possible prejudice from the AUSA's speculation in summation was adequately dispelled by the court's curative instruction.

2. The Purse of Pacheco

At trial, New York City Police Detective Scott Fowler described his execution of a November 10, 1988 search, pursuant to a warrant, of Cots's apartment in the building from which the Organization made most of its retail sales. Fowler stated that he had found, *inter alia*, a woman's pocketbook on the table in the kitchen of the apartment and had asked Organization member Aurea Rodriguez, who was in the apartment at the time of the raid, about the purse. Fowler testified that in the purse was an identification ("ID" or "I. D.") card:

> Q. Do you recall what the ID card said on it?
>
> A. Just one name that was on the ID.
>
> Q. And what name do you recall?
>
> A. Maria (Pronounced MAR-EYE-A by witness).

(Trial Transcript ("Trial Tr.") 537.) Neither the purse nor the ID card was seized.

Aurea Rodriguez testified that just prior to the raid, she had seen Pacheco in the kitchen of Cots's apartment. She also testified that Fowler asked her about the purse, which she denied was hers, and then showed her an ID bearing a picture. She testified, over Pacheco's objection, that the woman in the picture was Pacheco:

> Q. Did the officers show you anything?
>
> A. Yes.
>
> Q. What did they show you?
>
> A. They show [*sic*] me an I. D.
>
> Q. And can you tell us what the I. D. looked like?
>
> A. It had a picture on it.

Q. Do you know whose picture it was?

MR. VERDIRAMO [Pacheco's attorney]: Objection, unless the Government intends to produce the identification here.

THE COURT: Overruled.

Q. Do you know whose picture it was?

A. Yes.

Q. Whose picture was it?

A. It was Mirella's picture.

Q. Mirella who?

A. Pacheco.

(Trial Tr. 2869-70.) In summation, the government cited the testimony of Fowler and Aurea Rodriguez and referred to the purse as belonging to Pacheco.

Pacheco argues that she was unfairly prejudiced by the summation's attribution of the purse to her because, *inter alia*, neither the purse nor the ID had been admitted in evidence, because Fowler had stated that the ID was for a person whose name he pronounced "Mar-eye-a," not "Mirella," and because on cross-examination Aurea Rodriguez "admitted that the identification card she claimed to have seen never existed" (Pacheco brief on appeal at 21). We are unpersuaded.

It is the responsibility of the trial court to make a preliminary assessment of the reliability of proffered evidence, *see* Fed. R. Evid. 104(a), and its evidentiary rulings are reviewed generally for abuse of discretion, *see, e.g., Healey v. Chelsea Resources Ltd.*, 947 F.2d 611, 620 (2d Cir. 1991). The fact that a physical object is not available does not require the exclusion of relevant oral

testimony describing the object if the court is persuaded that the witness has the requisite personal knowledge, *see* Fed. R. Evid. 602. The result of a witness's observations need not be positive or absolutely certain to make his testimony admissible, *United States v. Evans*, 484 F.2d 1178, 1181 (2d Cir. 1973); 2 J. Wigmore, *Evidence* § 658, at 894-896 (Chadbourn rev. ed. 1979), and lack of certainty is a matter to be argued to the jury rather than a reason for excluding the evidence. The government is entitled, in summation, to argue all inferences that may permissibly be drawn from the evidence admitted. *See, e.g., United States v. Nersesian*, 824 F.2d at 1327.

The purse and the ID were not available for introduction at trial because they had not been seized in the November 10, 1988 raid. There was no error in the court's permitting Fowler, who had personally seen those objects, to describe them. Further, though the record is less clear than perhaps it should be, the fact that Fowler pronounced the name on the ID card "Mar-eye-a" did not mean that he had not seen the name "Mirella." There is no confirmation in the transcript that the name Fowler had seen was spelled "Maria" as the court reporter spelled it. Had Fowler himself spelled the name "Maria," we would have expected the trial judge, if presented with no evidence to equate "Maria" with "Mirella," to uphold an objection by Pacheco to Fowler's ID testimony on the ground of relevance. The trial record, however, is silent in this regard. The government stated at oral argument of this appeal that at trial it had attempted to have Fowler spell the name he had seen, but Pacheco had objected, and the objection had been sustained. Neither the attempt, nor the objection, nor the ruling, is reflected in the transcript. Nor is a sound basis for preventing the witness from spelling the name he had seen apparent from the record. Given the possibility

of mispronunciation of foreign names, we would think it a sound practice for the court to permit the witness, if he has a detailed recollection of what he has seen, to spell the name for the record. In the present case, any doubt that the name that actually appeared on the ID was "Mirella" was reduced, if not eliminated, by the testimony of Aurea Rodriguez, who knew and worked with Pacheco, and who testified that the ID was that of Mirella Pacheco.

Finally, we reject Pacheco's contention that Aurea Rodriguez's testimony did not provide a basis for the government to argue in summation that the ID and purse belonged to Pacheco. Aurea Rodriguez's testimony on direct examination, quoted above, was unequivocal. On cross-examination, Pacheco's attorney asked Aurea Rodriguez whether the government had shown her the purse or the ID when it showed her documents and "the evidence in this case" in "debrief[ing]" her; upon receiving "No" answers, he asked if it was not true that "there is no purse, there is no identification and there is no picture," to which Aurea Rodriguez responded "Yes." (Trial Tr. 3255.) This response, to questioning that seemed to focus on her trial preparation for the present prosecution, rather than on what she was shown at the time of the November 10, 1988 raid, hardly warrants Pacheco's assertion that Aurea Rodriguez "admitted that the identification card she claimed to have seen never existed." In any event, any conflict in her testimony went to the weight to be accorded her unequivocal statement that the ID had Pacheco's name and picture on it, not to the admissibility of that statement.

In sum, we find no error in the court's admission of the testimony of Fowler and Aurea Rodriguez nor any impropriety in the government's argument on summation that the purse and ID belonged to Pacheco.

CONCLUSION

The judgments of conviction are affirmed.

MESKILL, *Circuit Judge*, concurring:

I write separately because I do not agree with the majority's treatment of the wiretap issue, which effectively repeals 18 U.S.C. § 2518(3)'s requirement that a judge may only enter an order authorizing the interception of communications "within the territorial jurisdiction of the court in which the judge is sitting." I concur in the result reached by the majority, however, because, under the circumstances of this case, suppression of the evidence is not mandated by 18 U.S.C. § 2515.

Under the majority's interpretation of the statute any federal district court, circuit court of appeals or appropriate state court may authorize a wiretap any place in the country. A judge in the Southern District of New York may now authorize a tap on a phone in Chippewa Falls, Wisconsin, Nome, Alaska or Prescott, Arizona, even if no calls are ever placed to the east coast, as long as the listening post is set up in Manhattan. *See, e.g., United States* v. *Burford*, 755 F.Supp. 607, 609-11 (S.D.N.Y. 1991) (holding that judge in Southern District of New York could authorize wiretap in Maryland). Law enforcement officials are now able to shop, free from territorial constraints, for a judge who would be likely to authorize a wiretap. *Cf. Castillo* v. *State*, 810 S.W.2d 180, 184 (Tex. Crim. App.) (in banc) (interpreting parallel state statute to prohibit judge shopping). If a judge in one district denies authorization, law enforcement officials may simply move

their listening posts to another jurisdiction until they find a judge willing to authorize the wiretap.

The majority accomplishes this result by holding that a single captured communication is "intercepted" in more than a single jurisdiction, and that authorization in any one such jurisdiction is sufficient to satisfy Title III. While I agree that a federal court sitting in the jurisdiction in which the telephone to be tapped is located has authority to authorize a wiretap, I cannot join the majority in holding that the unilateral decision of law enforcement agents as to where to set up their listening post can grant authority to a judge in any jurisdiction to authorize a phone tap in any other jurisdiction. I do not believe that the conversations from the Imperio Cafe in New Jersey were "intercepted" in Manhattan.

The heart of the definition of "intercept" in 25 U.S.C. § 2510(4) is the "acquisition of the contents" of a communication. The contents of the Imperio Cafe communications were *acquired* by law enforcement officials when they were diverted in New Jersey. In Manhattan the *previously acquired* contents were transformed into sound, but, because they were already within the control of the law enforcement agents, they were not newly "acquired." I do not believe that the contents of a communication become acquired anew each time they are transformed into a different medium.

The phrase "aural or other" in the definition of "intercept" does not justify the result reached by the majority. "Aural" was originally included in section 2510(4) principally to place devices such as pen registers and trap and tracing mechanisms (which do not capture the sounds of a conversation) outside the scope of Title III. *See* S. Rep. No. 1097, 90th Cong., 2nd Sess., *reprinted in* 1968 U.S.

Code Cong. & Admin. News 2112, 2178 ("The proposed legislation is not designed to prevent the tracing of phone calls. The use of a 'pen register,' for example, would be permissible."); *see also Castillo*, 810 S.W.2d at 184 (This " 'language, identical to that in the federal statute, is apparently intended [only] to impose no limitation upon the use of devices such as pen registers that enable law enforcement officers to determine the numbers called from a telephone but not to orally [sic] acquire the "contents" of conversations.' ") (interpreting state statute) (citation omitted). That some courts interpreted "aural" to mean that the territorial jurisdiction requirement of section 2518(3) applied to the place where the communications were first heard, *see, e.g.*, *Evans* v. *State*, 252 Ga. 312, 314 S.E.2d 421, 423-26 (Ga.) (per curiam), *cert. denied*, 469 U.S. 826 (1984), was at most an unintended artifact of the structure of the statute.

In 1986, Congress amended that structure. Pen registers and tracing devices were separately regulated, *see* 18 U.S.C. § 3121 *et seq.*, and the definition of "contents" in Title III was narrowed so that those devices would no longer even arguably be included in the statute. *See* S. Rep. No. 99-541, 99th Cong., 2nd Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 3555, 3567-68 (discussing amendment to the definition of "contents"). This allowed Congress to expand the definition of "intercept" to protect the increasingly common non-verbal communications by altering "aural acquisition" to "aural or other acquisition" without bringing pen registers and tracing devices within the ambit of Title III.

Nothing in the legislative history suggests any intent to affect the territorial jurisdiction requirement of section 2518(3), either by originally including the term "aural" or by subsequently adding "or other." I do not believe that

Congress ever enacted a "principle that the place where the contents of a wire communication are first to be heard and understood by human ears . . . is the situs of an interception." Maj. Op. at A-2. Although prior to the 1986 amendment a literal reading of the statute might have resulted in the necessity to seek authorization in the place where the captured communication was first heard, there is no reason to believe that Congress intended such a result. Since the 1986 amendment, that unintended result is no longer required by the words of the statute.

The majority justifies its reading of the statute on policy grounds. The majority reasons that "[i]f all of the authorizations are sought from the same court, there is a better chance that unnecessary or unnecessarily long interceptions will be avoided." I am not sure that this is necessarily true, but even if unified authorization (which is not mandated under the majority opinion) does tend toward tighter control of law enforcement activities, it is also true that judges may be more hesitant to authorize excessive interceptions within their territorial jurisdiction, in their own back yard so to speak, than in some distant, perhaps unfamiliar, part of the country. Congress determined that the best method of administering wiretap authorizations included a territorial limitation on the power of judges to make such authorizations and this Court should be bound by that determination.

Even though I believe that Judge Leisure, sitting on the United States District Court for the Southern District of New York, did not have the power to authorize the wiretap of the New Jersey telephone, I concur in the result reached by the majority because I do not believe that Title III requires suppression of the evidence in this case. Suppression of certain intercepted communications is mandated by 18 U.S.C. § 2515. Significantly, however, that

statute does not exclude all evidence obtained in violation of Title III:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . before any court . . . *if the disclosure of that information would be in violation of this chapter.*

18 U.S.C. § 2515 (emphasis added). Disclosure of the contents of intercepted communications is prohibited by 18 U.S.C. § 2511(1)(c), which provides criminal and civil penalties for any person who discloses "the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection."At the time of trial, the government, having obtained the communications pursuant to court authorization, neither knew nor had reason to know that the information had been obtained in violation of Title III. Disclosure thus was not prohibited by section 2511(1)(c). Therefore, suppression was not required under section 2515.

I agree with the majority's treatment of all of the other issues in this appeal and in the result reached by the majority.

APPENDIX B

U.S. Department of Justice

United States Attorney
Southern District of New York

One Saint Andrew's Plaza
New York, New York 10007

February 27, 1990

SUBMITTED UNDER SEAL

BY HAND

Honorable Louis L. Stanton
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: *United States v. Roberto Rodriquez*
89 Cr. 576 (LLS)

Dear Judge Stanton:

The Government respectfully submits this letter in anticipation of the plea of the above-named defendant scheduled for today, February 27, 1990, at 12:00 noon.

As the Court is aware, Roberto Rodriguez is represented here by Frank Lopez. The purpose of this letter is to inform the Court of the fact that Mr. Lopez' wife, Lydia Lopez, is under indictment in the Northern District of California on

narcotics charges.[1] Mrs. Lopez has pleaded guilty in a sealed proceeding to a charge carrying a minimum term of 20 years, and has signed cooperation agreements with the United States Attorney's Offices in both the Northern District of California and the Southern District of New York. The fact of Mrs. Lopez plea and of her cooperation have been ordered sealed by the District Court in the Northern California case. Mr. Lopez is aware of his wife's plea and her cooperation with the Government, but has not participated in her discussions with the Government, nor has he represented her in any way in connection with the criminal charges against her.

At the plea scheduled for today, the Government intends to request that the Court ensure that Mr. Lopez has advised his client Roberto Rodriguez of the fact of his wife's arrest and prosecution, and then for the Court to conduct an inquiry of Roberto Rodriguez pursuant to *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), to ensure that Roberto Rodriguez is aware of the essential facts necessary to make a waiver of any hypothetical conflicts of interest.

Mr. Lopez has stated to the Government that he has in fact advised Roberto Rodriguez of his wife's prosecution. Further, Mr. Lopez concurs in the procedures suggested by the Government in this letter.

In cases involving potential conflicts of interest where a defendant desires to continue with his present counsel, the Second Circuit has directed the trial judge to: "(i) advise the defendant of the dangers arising from the particular conflict; (ii)

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[1] Indictment 89 Cr. 329 (ND Cal.) (TEH) (N.D. Cal. 1989), charges Lydia Lopez with conspiring to distribute more than one kilogram of heroin, making telephone calls in furtherance of the conspiracy, traveling in interstate commerce in furtherance of a heroin business, and attempting to possess with intent to distribute more than one kilogram of heroin. Because Mrs. Lopez has a prior narcotics felony conviction, she is facing a mandatory minimum prison term of 20 years and a possible maximum of life.

determine through questions that are likely to be answered in narrative form whether the defendant understands those risks and freely chooses to run them; and (iii) give the defendant time to digest and contemplate the risks after encouraging him or her to seek advice from independent counsel." *United States v. Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986), citing, *Curcio*, 690 F.2d at 888-90.[2]

Under the relevant case law, where a convicted defendant establishes an actual conflict of interest "he need not prove prejudice, but simply that a 'lapse in representation,' *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980), resulted from the conflict." *Iorizzo*, 786 F.2d at 58. Neither the Government nor Mr. Lopez believe that the circumstances surrounding Mrs. Lopez's prosecution and her cooperation with the Government give rise to any actual conflict. However, the Sixth Amendment imposes an independent duty on the trial judge to inquire "when it 'knows or reasonably should know that a particular conflict exists,'" *United States v. Aiello*, 814 f.2d 109, 113 (2d Cir. 1967), citing *Cuyler*, 446 U.S. at 347. As such, the Government believes it is essential to bring this hypothetical conflict to the attention of the Court.

There is simply no reason to believe that during trial preparation or at the trial in this case, Mr. Lopez has been or will be laboring under any divided loyalties due to the predicament which his wife, and not he, faces. Consequently, there is no basis for the Government to move for Mr. Lopez's disqualification due to an "actual" conflict of interest.

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[2] In *Iorizzo*, the Court held that an alleged waiver of a potential conflict arising from the prior representation by defense counsel of a Government witness was inadequate where (1) the *Curcio* inquiry was conducted by the defense lawyer, and not the trial judge; (2) the risks that the defense lawyer would forgo relevant cross-examination were not explained to the defendant; and (3) the defendant had not been afforded sufficient time to reflect upon the potential conflict or informed that he could seek the advice of independent counsel.

Moreover, cases like *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984) and *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983), are not applicable because to the best of the Government's knowledge, Mr. Lopez has no reason to fear criminal prosecution in connection with the charges against his wife or to believe that any cooperation by his wife will lead to the discovery of any criminal activity by himself. In addition, the charges against Lydia Lopez are not related in any way to the charges against Roberto Rodriguez, and Mr. Lopez is simply not participating in any potential plea discussions on behalf of his wife with the Government.[3]

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[3] In *Cancilla*, a conviction was reversed on appeal due to a lawyer's actual conflict of interest when the lawyer was assumed, for purposes of the appeal, to be guilty of the same criminal conduct for which his client was being tried. Under those circumstances, the Court applied a *per se* rule in finding a violation of the Sixth Amendment, and the defendant was not required to show actual prejudice. The Court reasoned that the dangers the lawyer would not vigorously represent his client were particularly acute where "the very evidence at trial or in plea negotiations might well lead to discovery of the attorney's prior criminal activity." 725 F.2d at 870. Such circumstances are simply not present here.

Similarly, in *Solina*, the Court reversed a conviction and declined to require the defendant to show that an actual conflict had an effect on his lawyer's representation where the defendant had been represented by an unlicensed attorney.

The Government does not believe that such a *per se* rule would apply in the instant case. To prevail on any claim for post-conviction relief due to an alleged conflict of interest in this case, Kelly would have to demonstrate that his lawyer actively represented conflicting interest, and that the alleged conflict caused "a lapse in representation." *Iorizzo*, 786 F.2d at 86. Indeed, the Second Circuit has recently cautioned that it had "adopted and applied the per se rule without enthusiasm" and it has "never purported to expand the applicability of the rule beyond the sort of egregious conduct present in *Solina* and *Cancilla*. *Waterhouse v. Rodriguez*, 848 F.2d 375, 383 (2d Cir. 1988).

Because Mr. Lopez is not representing his wife, and hence has no reason to curry favor with the Government by lapsing in his representation of Roberto Rodriguez, there simply is no actual conflict of interest. However, out of an abundance of caution, the Government believes that this Court should conduct an inquiry of Roberto Rodriguez pursuant to the procedures outlined in *Curcio*, so that Mr. Rodriguez can make an informed decision as to whether he wishes to continue with Mr. Lopez as his lawyer despite any *potential* conflicts of interest. Such an inquiry will prevent any baseless post-conviction claims by Rodriguez that his lawyer did not adequately protect his interests due to an alleged conflict.

At the *Curcio* hearing, the Government would recommend that at a minimum Mr. Rodriguez be advised of the charges against Mrs. Lopez, the fact that Mrs. Lopez may also be subject to prosecution in the Southern District of New York, as well as the hypothetical courses of action facing any defendant such as Mrs. Lopez -- that is, to go to trial, to plead guilty, or to cooperate with the Government.

Because the fact of Mrs. Lopez' plea and her cooperation are under court-ordered seal, the Government requests that the Court not inform Mr. Rodriguez of those facts. Instead, the Government requests that the Court advise Mr. Rodriguez of the possibility -- open to any defendant -- that Mrs. Lopez might plead and cooperate with the authorities. The Court may wish to present Mr. Rodriguez with a hypothetical "worst-case scenario," and to ask him to assume that Mrs. Lopez is in fact cooperating with the Government. Such a hypothetical would ensure that Mr. Rodriguez understands the full scope of the potential conflict presented by Mr. Lopez' representation, without disclosing the confidential nature of Mrs. Lopez' cooperation.

The Government notes that this procedure was recently adopted by Judge Knapp, who conducted a *Curcio* inquiry of

one of Mr. Lopez' clients, Kevin Kelly, in connection with *United States v. James Coonan, et al.*, S 87 Cr. 249 (WK). Judge Knapp posed to that defendant the hypothetical possibility that Mrs. Lopez might cooperate with the Government, and successfully obtained a knowing and intelligent waiver from Kevin Kelly on that basis.

Because of the sensitive matters disclosed in this letter, the Government requests that this letter be ordered sealed until further order of the Court.

Respectfully submitted,

OTTO G. OBERMAIER
United States Attorney

By: _____
NELSON W. CUNNINGHAM
Assistant U.S. Attorney
(212) 791-1143

cc: Frank A. Lopez, Esq.
60 Hudson Street
23rd Floor
New York, New York 10013

SEALED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

89 Cr. 576 LLS

UNITED STATES of AMERICA

v.

ROBERTO RODRIGUEZ,

Defendant

February 27, 1990
12:25 pm

Before:

HON. LOUIS L. STANTON,

District Judge

APPEARANCES

OTTO G. OBERMAIER,
United States Attorney for the
Southern District of New York,
NELSON CUNNINGHAM,
Assistant United States Attorney

FRANK LOPEZ,
Attorney for defendant

NANCY FESTINGER,
Spanish Interpreter

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(In open court)

(Case Called)

Nancy Festinger, Spanish Interpreter, was duly sworn)

MR. LOPEZ: Yes, your Honor, the first situation I would like to address myself to is a letter that has been submitted by hand to your Honor with respect to a personal situation regarding Lydia Lopez. I have told the defendant the following: That as far as Lydia Lopez is concerned, your Honor, I am not her attorney, I have not been part of the negotiations there. As a matter of fact, we were separated and we were going into divorce proceedings at the time and, however, I have given him the background of that case, that she was arrested in the United States District Court for the Northern District of California.

I have advised him she has her own lawyer there, I am not involved in any of the negotiations and, Lydia Lopez, like any other defendant, has a lot of options:

To go to trial, take a plea and cooperate, be a cooperating individual. I was unaware she was in California, that I in no way am related to any of the events that happened there, and I tell him this on the issue of conflict and on the exercise of caution. I have been through this in a number of cases and that is why in our best judgment that both the government and myself have addressed this matter to the court so that if your Honor wishes to make inquiry of Mr. Rodriguez, he will be happy and delighted to answer any of your questions in this respect.

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THE COURT: All right, thank you, Mr. Lopez.

MR. LOPEZ: Thank you, your Honor.

MR. CUNNINGHAM: As an initial matter, the government would request that this portion of the hearing be sealed because of -- well, because of certain of the facts of the Northern California case, the government would request that this portion of the hearing be sealed. If we're able successfully to move on to the plea portion of today's proceedings, the government would see no need for that portion of the proceedings to be sealed.

THE COURT: Well, I've read your letter, Mr. Cunningham, the letter that Mr. Lopez referred to dated February 27, 1990, and I agree that it should be sealed. I am less clear that this portion of the transcript of today's proceedings should be sealed unless something comes up that requires sealing at the time we finish.

MR. CUNNINGHAM: Perhaps we can do it retroactively, then, if it seems to us it ought to be sealed.

MR. LOPEZ: Your Honor, may I just point out, we really don't know what Lydia Lopez' position is right now that I can tell the court about in any official capacity. The reason that I suggest sealing at this time is that if the record is unclear and some reporter picks this up and she has exercised an option to cooperate and she is in the midst of a cooperation, we might be giving publicity to a situation that there is really no need to give publicity to at this time.

If someone comes along and for some just cause indicates they would like this portion of the matter

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unsealed, then your Honor can address itself and the government can address itself to that issue, but I think in the exercise of caution, that we should seal it initially and then decide whether or not at some future date we should unseal it. Let's assume in the worst scenario case, as the letter points out, that she is cooperating actively at the present time, let's assume that. I don't think that with the number of defense lawyers here, et cetera, that may be obtaining a copy of the plea minutes of Roberto Rodriguez, that we should give public notice of this. That's my feeling in the matter.

THE COURT: Mr. Cunningham.

MR. CUNNINGHAM: Well, the government would tend to agree with Mr. Lopez that the minutes of Mr. Rodriguez' plea are likely to be requested by other counsel in the case. It would be unfortunate if any of them were to draw any unfair inference from the first half of this proceeding which might cause them, without basis, to make certain suspicions about that individual.

THE COURT: I think Mr. Lopez' position is a prudent one and will direct that this portion of the minutes starting with his opening address to the court, and continuing until further notice, be sealed, with copies available only to counsel for Mr. Rodriguez and to counsel for the government and to others only upon application, but counsel for Mr. Rodriguez and for the government may have it without application to me.

MR. CUNNINGHAM: Thank you, your Honor.

THE COURT: Ms. Brown, would you place Mr. Rodriguez under oath, please.

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(The defendant was sworn)

THE COURT: Mr. Rodriguez, do you understand that you're now under oath and if you answer any of my questions falsely, your answers may later be used against you in another prosecution for perjury or for making a false statement?

THE DEFENDANT: Yes.

THE COURT: How old are you, Mr. Rodriguez?

THE DEFENDANT: 42 years old.

THE COURT: How far did you go in school?

THE DEFENDANT: Up to 8th grade in Cuba.

THE COURT: When you communicate with Mr. Lopez, do you communicate with him in English or Spanish?

THE DEFENDANT: In Spanish.

THE COURT: And he speaks fluent Spanish?

THE DEFENDANT: Yes.

THE COURT: Have you understood everything he has been saying to you?

THE DEFENDANT: Yes.

THE COURT: Have you ever been treated for any mental illness or addiction to narcotic drugs of any kind?

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THE DEFENDANT: No.

THE COURT: Have you taken any drugs or medicine or pills or drunk any alcoholic beverage in the last 24 hours?

THE DEFENDANT: No.

THE COURT: Do you understand what's happening today?

THE DEFENDANT: Do I know what's happening? Yes.

THE COURT: Yes, do you?

THE DEFENDANT: Yes.

THE COURT: And you know that you're faced with charges that have a minimum sentence of 20 years imprisonment and a maximum of life imprisonment?

THE DEFENDANT: Yes.

THE COURT: And you know that you could be required to pay a fine of as much as $2 million?

THE DEFENDANT: yes.

THE COURT: What is the period of --

MR. LOPEZ: 1988-1989.

THE COURT: Excuse me?

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MR. LOPEZ: Was that what you were asking, the period of conspiracy?

THE COURT: No. I was really asking what was the period of supervised release which is required?

MR. CUNNINGHAM: Section 848 (a) contains no provision with respect to mandatory supervised release. I would suspect that the applicable sentencing guidelines provisions would require a period of supervised release, but it's not contained in the statute of this charge.

As an additional matter of the possible penalty that the defendant may suffer here, Section 848 (a) has forfeiture provisions. The indictment against the defendant lists a number of items which the government alleges should be forfeited, and the defendant is at risk for having those items forfeited upon his plea of guilty.

THE COURT: Where is the list? I don't see it in Count 2.

MR. CUNNINGHAM: It is contained at the end of the indictment, the last two and a half pages of the indictment, your Honor.

THE COURT: I see. Mr. Rodriguez, have you been over the indictment, that's the written statement of the charges, against you --

THE DEFENDANT: Yes.

THE COURT: -- with Mr. Lopez and have you fully--

THE DEFENDANT: Yes.

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THE COURT: -- fully, fully discussed those charges and the case in general with Mr. Lopez?

THE DEFENDANT: Yes.

THE COURT: Are you fully satisfied with the counsel and representation and advice given you in this case by Mr. Lopez, as your attorney?

THE DEFENDANT: Yes.

THE COURT: And you understand that the indictment lists a considerable amount of property, including the stock in the Emperia Cafe and Hot Shot Construction Company and your personal property and assets, including your bank account at the Provident Bank in New Jersey and $63,200 in currency that was in the possession of Avaristo Valentine and $62,425 in currency at the Emperia Cafe, all of which may be forfeited, that is, become the property of the United States Government if your plea of guilty to this count is accepted? You're aware that that may happen?

THE DEFENDANT: Yes.

THE COURT: All that property may be taken?

THE DEFENDANT: Yes.

THE COURT: So you understand that you're facing very serious charges under this Count 2?

THE DEFENDANT: Yes.

THE COURT: Now, if at any time I say anything that

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you don't understand or that you have a question about, you can stop me and say that you don't understand it and ask a question either of me or of Mr. Lopez at any time that you wish. Will you do that, if there is anything you don't understand?

THE DEFENDANT: Yes, I will ask.

THE COURT: Now, what Mr. Lopez was saying at the beginning of this hearing is that his wife -- or his former wife, Lydia Lopez, is herself under an indictment in the Northern District of California, and she is charged with narcotics violations. She's charged with conspiring to distribute narcotics and making telephone calls in that connection and traveling in interstate commerce to carry on a heroin business and attempting to possess heroin with the intent to distribute it.

She also has a prior narcotics felony conviction, so if she is convicted on the charges that are facing her, she's facing a minimum prison term of 20 years and she could be imprisoned for life. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, facing those charges, she has the same choices that any defendant facing criminal charges has: She can plead not guilty and go to trial or she can plead guilty or she can plead guilty and cooperate with the government.

If she cooperates with the government, it would be in the hope of obtaining a lesser sentence than she would otherwise receive, and that's perfectly clear to you, isn't it?

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THE DEFENDANT: Yes.

THE COURT: Now, it's possible that she could be charged with narcotics violations in this district, in the Southern District of New York, so what I want you to do is to assume the worst possible situation, assume that Mrs. Lopez or the former Mrs. Lopez did cooperate or was cooperating with the government and was trying to get a lighter sentence, and assume that Mr. Lopez, your lawyer, wanted her to get as light a sentence as she could, and assume that he feared that if he represented you too vigorously, he might irritate the government and that in some way they would not give his former wife a lighter sentence or ask the court to give his former wife a lighter sentence because of how strong a defender he was in your case.

Do you follow what I've been saying?

THE DEFENDANT: Yes.

THE COURT: What I want to do is point out to you that there may be a risk to you in that situation, so that you and I are both fully clear that you understand that risk.

THE DEFENDANT: Yes.

THE COURT: Are there any questions you would like to ask about it?

THE DEFENDANT: No.

THE COURT: Now, if you have any reluctance of any sort or you'd prefer to take some time to think this over

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or you'd like to talk to another lawyer about it out of Mr. Lopez' hearing and get another opinion or, as I say, if you're the least bit reluctant to proceed with Mr. Lopez, just say so and I'll give you the opportunity to think it over, to discuss it with any other lawyer that we could provide, to change counsel, whatever you wish in this connection. Would you like to do any of those things?

THE DEFENDANT: No.

THE COURT: Now, you understand that you could have separate counsel representing you?

THE DEFENDANT: That I could have?

THE COURT: Separate counsel, somebody else than Mr. Lopez?

THE DEFENDANT: No.

THE COURT: Do you understand you could have that?

THE DEFENDANT: Yes, I could, yes.

THE COURT: But you don't wish that. Is that what you're saying?

THE DEFENDANT: No.

THE COURT: You don't wish it?

THE DEFENDANT: No, I don't.

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THE COURT: Do you wish to consult with any other counsel about this?

THE DEFENDANT: No, I don't want to consult about anything with any other attorney.

THE COURT: Very well. Is there any further allocution on this point that either the government or Mr. Lopez would like me to conduct?

MR. CUNNINGHAM: Not from the government, your Honor.

MR. LOPEZ: Not from me except to the fact that until today I don't think I have ever discussed this situation with Mr. Cunningham, nor have I discussed it -- I would like to make that for the record -- discussed this situation with respect to Roberto Rodriguez or any impact that might have with regard to Lydia Lopez or anything of the sort, I would like to make that representation for the record and to your Honor, it has never been discussed.

THE COURT: I quite understand that, Mr. Lopez. Then I think that that is the portion of the record that should be sealed.

MR. CUNNINGHAM: Does your Honor have a finding with respect to the knowing and intelligent nature of the defendant's waiver of any potential conflict?

THE COURT: Yes, I do. I find that Mr. Rodriguez is competent and understands the colloquy which we have had about Mrs. Lopez' involvement with her narcotics charges and the possible connection of that

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situation with Mr. Lopez' representation of him, that he appreciates the risk that Mr. Lopez' predicament might in some way temper or weaken Mr. Lopez' representation of Mr. Rodriguez, and that with that understanding in mind, he chooses not to consult with any other lawyer or to take time to think the situation over further or to avail himself of the offer of separate counsel, but willingly and voluntarily desires to proceed with the plea.

Have you understood what I've been saying, Mr. Rodriguez?

THE DEFENDANT: Yes.

THE COURT: Is it all right, have I spoken accurately?

THE DEFENDANT: Yes.

THE COURT: Very well. I so find.

MR. CUNNINGHAM: Do we now go on the public record, your Honor?

THE COURT: Yes, we may.

(The remainder of the proceedings may be found unsealed and under separate cover)

Jerome A. Harrison